



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Order 95-8-48

Issued by the Department of Transportation
on the 30th of August, 1995

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**U.S.-LIMA COMBINATION
SERVICE PROCEEDING
(NON-MIAMI PHASE)**

Docket OST-95-370 - 46

ORDER STRIKING EXHIBITS

SUMMARY

By this order we grant American Airlines, Inc.'s motion to strike certain rebuttal exhibits of Continental Airlines, Inc., submitted on August 25, 1995, proposing nonstop service between Newark and Lima.

BACKGROUND

By Order 95-7-23, the Department instituted the U.S.-Lima Combination Service Proceeding, Docket OST 95-370, to among other things, select a carrier or carriers to provide service between points in the United States (other than Miami/Ft. Lauderdale) and Lima, Peru. American and Continental are the **only** applicants. On August 7, 1995, at the request of American and supported by Continental, we accelerated the procedural schedule for the proceeding by requiring that rebuttal exhibits be filed by August 25, 1995 and briefs by September 1, 1995.¹

American's Motion

On August 28, 1995, American filed a motion requesting that the Department strike certain rebuttal exhibits* of Continental submitted on August 25, 1995,

¹ See Notice dated August 16, 1995, confirming this action.

² Exhibits CO-R-1141 -1150 and all references to nonstop Newark-Lima service in CO-RT-1.

concerning nonstop Newark- Lima service. American stated that the nonstop Newark-Lima exhibits are highly improper and prejudicial and should not be allowed at this late stage in the proceeding. American stated that Continental submitted an application to serve Newark and Lima on a one-stop basis via Bogota which the Department consolidated into this proceeding, and that Continental provided evidence in support of that service in its direct exhibits.³

In making its argument that Continental's change in the service proposal is prejudicial, American cited two cases. American argued that in the U.S.- *U.S.S.R. North Atlantic Combination Service Case*, Docket 47147, Administrative Law Judge Robert L. Barton refused to allow an applicant to introduce a new service proposal in revised exhibits just a few days before rebuttal exhibits were due. American also cited the *Florida-Texas Service Case*, 24 C.A.B. 308,317 (1956), as upholding the exclusion of the rebuttal exhibits submitted by Eastern Air Lines concerning additional service not shown in Eastern's direct case.

In addition to objecting to Continental's action, American objected to any postponement in the date for briefs, because such postponement would delay the Department's decision.

By Notice dated August 29, 1995, the Department required that answers to American's motion be filed no later than 3:00 p.m. E.D.T. on August 29, 1995. Continental and the Dallas/Fort Worth Parties filed answers to American's motion; American and United Air Lines, Inc. filed replies.

Continental argued that the Department should deny American's motion immediately and consider its revised plans. In support Continental cited the Los Angeles-Guadalajara Exemption⁴ and U.S.-Brazil Combination Service Frequency Allocation⁵ proceedings where they allege that American and United, respectively, changed their start-up date and where the Department considered these changes in operating plans. Furthermore, Continental argued that it indicated in its direct exhibits that it planned to institute nonstop Newark-Lima service when conditions permitted it to do so.⁶ Continental maintained that it was forced to reevaluate its plans because American successfully delayed action on Continental's previously unopposed request for Newark-Bogota authority.

Continental argued that American's reliance on the U.S.- *U.S.S.R. North Atlantic Combination Service Case* has no relevance because that case was an oral

³ See Docket 50405 and Order 95-7-23, July 17, 1995, p. 11.

⁴ Order 95-8-3(OST-95-244), August 2, 1995.

⁵ Order 95-8-18(OST 95-247), August 11, 1995.

⁶ Continental cited Exhibit COT-1 at 2.

evidentiary proceeding before an administrative law judge involving numerous applicants. Similarly, Continental argued that the *Florida-Texas Service Case* was an oral evidentiary hearing where rebuttal exhibits contained new proposals based on differing interpretations of the forecast year selected by the examiner, not on changed circumstances unforeseen at the time proposals were submitted initially. Continental claimed that the *Los Angeles-Guadalajara Exemption* and *U.S.-Brazil Frequency Allocation* proceedings are more analogous to this situation.

The Dallas/Fort Worth Parties joined American's motion to strike. The Dallas/Fort Worth Parties argued that such a change in Continental's proposal is unfair and prejudicial because American and the Dallas/Fort Worth Parties concentrated on showing that American's proposed nonstop DFW-Lima service was superior to Continental's proposed one-stop service. Furthermore, the Dallas/Fort Worth Parties argued that with briefs due this Friday, September 1, 1995, it would highly inequitable to allow Continental to submit a new service proposal at this late stage. The Dallas/Fort Worth Parties stated that it would disrupt the orderly and timely procedural schedule designed to select an airline that can take advantage of newly available frequencies at the earliest possible date.

On August 30, 1995, American submitted a motion for leave to file and reply to Continental.' American asserted that Continental did not file direct exhibits pursuant to the evidence request in support of nonstop Newark-Lima service. American argued that the *Los Angeles-Guadalajara Exemption Proceeding* has no relevance, because there the applicants' proposed start-up dates of May 1, 1995, had passed by the time the show-cause order was issued on June 23, 1995 and the revised service plans were presented in response to a Department notice requiring American and United to provide new start-up dates and to confirm their service proposals. American renewed its request that the Department strike certain Continental exhibits concerning nonstop Newark-Lima exhibits and maintain the procedural schedule calling for briefs on September 1.

On the same day, United also filed a motion for leave to file and reply to the answer of Continental, addressing what it described as mischaracterizations by Continental of United's actions in the *U.S.-Brazil Combination Service Frequency Allocation Proceeding*.⁸ United did not take a position on the merits of American's and Continental's applications or American's motion to strike.

DECISION

⁷ We will grant American's motion for leave to file.

⁸ We will grant United's motion for leave to file.

Existing judicial precedent requires us to ensure adequate due process to applicants.⁹ American and the Dallas/Fort Worth Parties had the opportunity to comment on Continental's one-stop service, not nonstop service. They have detrimentally relied on Continental's one-stop service proposal. With briefs due this Friday, Continental cannot now insist on introducing a new service proposal.

We are unpersuaded by Continental's arguments that further procedures would not be necessary because its direct exhibits indicated its plans to institute nonstop Newark-Lima service when conditions permitted and, thus, American was on notice of its proposed plans. Continental did not respond to the Department's detailed evidence request to support its nonstop service proposal. Rather, it instead responded in support only of its one-stop service proposal. Parties cannot be expected to comment in any meaningful way on mere conjecture or speculation of initiating any given service at some future date. Indeed, Continental's claims merely indicate that its direct exhibits state that, as traffic develops, it will be able to operate nonstop service in the Newark-Lima market within two years of inaugurating service.¹⁰

Furthermore, the cases cited by Continental in support of its position are inapposite. In the *Los Angeles-Guadalajara Exemption Proceeding* the revised plans were submitted in response to a Department notice, not unilaterally by the parties. Similarly, in the *U.S.-Brazil Combination Service Frequency Allocation Proceeding* the Department invited the carriers to file additional applications and/or to amend their existing application consistent with the information requested in the June 21, 1995 Notice. In contrast, Continental made a unilateral change to its service proposal at a late stage in this proceeding.

At this point, it would be grossly unfair to the other parties, as well as being at odds with the overriding need for expedition in this particular proceeding — a need which Continental itself has acknowledged- to allow Continental to introduce a new service proposal. Fundamental due process would require the Department to reopen the record in this proceeding and conduct a fresh round of pleadings to permit other parties to comment on Continental's nonstop Newark-Lima service proposal. That would delay our final decision. Therefore, in the interest of expedition, to ensure use of newly-awarded authority as soon as possible, we will not permit Continental to introduce a new service proposal at this late stage of this proceeding.

⁹ For example, in *Mohawk Airlines, Inc. v. C.A.B.*, 412 F.2d 8 (2d Cir. 1969), the Second Circuit reversed a C.A.B. decision on the ground that the Board had not clearly included certain route authority within the scope of the proceeding, and thus had not given an interested carrier adequate notice.

¹⁰ Exhibit CO-T-1 at 2.

ACCORDINGLY,

1. We grant American's motion to strike Exhibits CO-R-1141 -1150 and all references ~~to nonstop~~ Newark-Lima service in CO-RT-1;
2. We grant American's and United's motion for leave to file and reply to Continental Airlines, Inc. proposing nonstop Newark-Lima Exhibits; and
3. We will serve this order on American Airlines, Inc.; Continental Airlines, Inc.; United Air Lines, Inc.; the Dallas/Fort Worth Parties; the Metro Newark Regional Business Partnership; the Ambassadors of Peru and Colombia in Washington, D.C.; and the U.S. Department of State (Office of Aviation Negotiations).

MARK L. GERCHICK

Acting Assistant Secretary for Policy
and International Affairs

(SEAL)